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Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RAMSEY CLARK and LAWRENCE W. SCHILLING,
Petitioners,

v.

MARGARET THATCHER, former Prime Minister of Great Britain and THE UNITED KINGDOM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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October 22, 1992

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia Circuit correctly concluded that Petitioners violated Fed. Rule Civ. P. 11 by suing the United Kingdom and former Prime Minister Thatcher for damages allegedly incurred as a result of the U.S. bombing raid on Libya in April 1986.

2. Whether the Court of Appeals correctly concluded that plaintiffs' appeal of the District Court's dismissal of their action was frivolous, in violation of Fed. Rule App. P. 38.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RULE 11 SANCTIONS	5
II. THE COURT OF APPEALS DID NOT ERR IN IMPOSING RULE 38 SANCTIONS	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 3, 10, 11
Business Guides v. Chromatic Communications Ent., 111 S. Ct. 922 (1991) 9
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) ..... *passim*
Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990) 4
In re Korean Air Lines Disaster of Sept. 1, 1983, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985) 11
Practical Concepts Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987) 11
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 6
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985) 11
Thornton v. Wahl, 787 F.2d 1151 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986) 9
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 10, 11

STATUTES AND RULES

Alien Tort Statute, 28 U.S.C. § 1350 ..... 10, 11
Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* 10, 11
Fed. R. Civ. P. 11 ..... *passim*
Fed. R. App. P. 38 ..... *passim*
Sup. Ct. R. 10 5

MISCELLANEOUS

5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336 (1990) 8

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case is here for a second time. Two years ago, this Court denied a petition for a writ of certiorari seeking review on the merits of the lower courts' dismissal of the complaint. Now, Petitioners, counsel for the plaintiffs in the underlying litigation, seek review of the lower courts' imposition of sanctions under Fed. Rule Civ. P. 11 and Fed. Rule App. P. 38.

The litigation arose out of claims by 55 Libyan nationals who sought to recover from the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") and its then Prime Minister, Margaret Thatcher, as well as from the United States, President Reagan, and other U.S. Government officials, damages for alleged personal injuries, death, and property loss in Libya. According to the

Complaint (A30),[1] the plaintiffs' damages were alleged to have resulted from a bombing raid carried out on April 14-15, 1986 on Libyan territory by aircraft of the United States Air Force and Navy, launched from U.S. bases in the United Kingdom and from U.S. aircraft carriers in the Mediterranean Sea. Plaintiffs alleged that the United Kingdom and Prime Minister Thatcher gave the United States permission to use American bases in the United Kingdom to launch the attack on Libya "knowing that the attack was illegal" under various international agreements, resolutions, treaties, declarations, and documents asserted to constitute the customary international law of human rights.

The Respondents moved to dismiss the action as to them on grounds of lack of subject matter and personal jurisdiction, nonjusticiability of plaintiffs' claims under the act of state and political question doctrines, and failure to adequately plead a cause of action. They also moved for an award of attorneys' fees and costs under Fed. Rule Civ. P. 11.

The District Court dismissed the plaintiffs' claims as to all defendants (A17, 702 F. Supp. 319 (D.D.C. 1988)) and held that "[t]he case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." (A26, 702 F. Supp. at 322.) Nonetheless, it declined to award attorneys' fees and costs to Respondents under Rule 11 on the ground that the suit was "brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement." (A27, 702 F. Supp. at 322.) On appeal the Court of Appeals for the District of Columbia Circuit summarily affirmed the dismissal of the Complaint "substantially for the reasons stated" by the District Court. (A7, 886 F.2d at 441.) In addition, the Court of Appeals

[1] Citations are to the Appendix to the Petition (A——).

granted Respondents' motion for summary reversal of the District Court's decision not to impose sanctions under Rule 11 and remanded the matter to the District Court for imposition of an appropriate sanction.

With respect to Rule 11, the Court of Appeals stressed the District Court's finding that Petitioners "surely knew" that plaintiffs' case "offered no hope whatsoever of success." By virtue of that finding, the Court held that "the district court had already determined in effect that a [Rule 11] violation had occurred," which violation could not properly be disregarded on the asserted ground that the federal courts should serve as a fora for "protests" of Presidential action. (A12, 886 F.2d at 440.) The Court of Appeals also granted, pursuant to Fed. Rule App. P. 38, Respondents' request for attorneys' fees and costs incurred on the appeal. The Court explained that this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), "clearly bars plaintiffs' claim against the United Kingdom, and . . . so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal." (A13, 886 F.2d at 431.) The fees and costs for the appeal were subsequently fixed by the Court of Appeals in the amount of $16,852.07 and taxed jointly and severally against Petitioners.

After Petitioners' first petition for writ of certiorari was denied, 495 U.S. 932 (1990), Petitioners complied with the Court of Appeals' Rule 38 order and paid Respondents the amount assessed by the Court of Appeals.

On remand, Respondents filed an application with the District Court for monetary sanctions under Rule 11 in the amount of the approximately $116,000 in attorneys' fees and disbursements that they had incurred. Petitioners argued in opposition that Rule 11 had not been violated and that, if it had, the appropriate sanction

would be a nonmonetary sanction or a monetary sanction that is nominal in amount. The District Court held that it had received from the Court of Appeals an unequivocal direction to impose sanctions. Quoting the Court of Appeals' decision in *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990), which calls for the selection of a sanction for a Rule 11 violation representing "a case-specific balance between equity, deterrence, and compensation," the District Court concluded that Petitioners should each pay Respondents the sum of ten thousand dollars. (A14-16.)

In their second appeal Petitioners sought to challenge again the award of Rule 11 and Rule 38 sanctions against them. The Court of Appeals held that "the law of the case doctrine bars this challenge." (A2, 960 F.2d 1060.) It also rejected Petitioners' argument that a non-monetary Rule 11 sanction should have been imposed because "the District Court considered this possibility and reasonably exercised its discretion to impose a fine instead." *Id.*

ARGUMENT

The Court of Appeals correctly applied established law in holding that Petitioners violated Rule 11 and Rule 38 and in affirming the Rule 11 sanctions imposed by the District Court. The United Kingdom and its former Prime Minister have been subjected to more than four years of litigation on claims that, as the District Court correctly recognized, had no prospect for success from the outset. The Rule 11 sanctions ordered by the District Court and the Rule 38 sanctions ordered by the Court of Appeals go only a small fraction of the way toward making Respondents whole for the expense and disruption caused by Petitioners' decision to pursue this litigation. Although their argument is replete with rhetorical flourishes, Petitioners do not contend that the decision below conflicts with that of any other federal court of appeals or any applicable decision of this Court. Nor does the case present any important but unsettled question of federal law. None

of the considerations identified in Rule 10 of the Rules of this Court is present, and the decision below is plainly correct. Further review is not warranted.

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RULE 11 SANCTIONS

Petitioners argue that the Court of Appeals' first decision, by holding that Petitioners violated Rule 11, erroneously failed to give "the required deference to the District Court's decision to deny sanctions and erroneously precluded the District Court on remand from exercising its full discretion under Rule 11." Petition at iii. That argument is inconsistent with this Court's holdings in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

Cooter & Gell held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." 496 U.S. at 405. The case further held, however, that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* After reviewing in detail the background of the strengthened Rule 11 ("any interpretation must give effect to the rule's central goal of deterrence," *Id.* at 393), this Court emphasized that the rule *mandates* the imposition of sanctions when a violation is found. *Id.* at 395.

The Court of Appeals' remand in this litigation was fully consistent with this Court's rulings in *Cooter & Gell*. The Court of Appeals did not conduct a *de novo* review and reverse the District Court on the question of whether the standard for imposition of sanctions under Rule 11 had been met. Rather, the Court correctly concluded that the District Court had "found, in substance if not in terms, that plaintiffs' counsel had violated Rule 11." (A11, 886 F.2d at 440.) The District Court nevertheless committed legal error when it denied sanctions based on the legally flawed reasoning that the federal courts may func-

tion as a forum for "protests." *Id.* As this Court said in *Cooter & Gell*, it is entirely proper and indeed necessary, for an appellate court to correct a district court's *legal errors* in applying Rule 11. Where a district court has relied "on a materially incorrect review of the relevant law," the Court of Appeals should intervene. 496 U.S. at 402. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Id.* (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). The Court of Appeals left it to the District Court to determine in the first instance what appropriate Rule 11 sanctions should be imposed. The Court of Appeals did not disturb the District Court's conclusions in that regard.

Cooter & Gell makes it plain, as does Rule 11 itself, that the District Court has great leeway in selecting the appropriate sanction where a violation of the Rule has occurred:

> No dispute exists that the appellate courts should review the district court's selection of a sanction under a deferential standard. In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. *See also* Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 (suggesting a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

496 U.S. at 400.

The District Court was well-acquainted with this case when it considered what would be an appropriate sanction. It clearly did not abuse its discretion in selecting the sanction of a $10,000 monetary payment to Respondents from each of the Petitioners. The District Court's decision followed a meeting with counsel in chambers, an unsuccessful effort between counsel to negotiate a mutually acceptable monetary sanction, and the filing of substantial papers on the subject by the parties.

Counsel for the Respondents established that the latter had expended $115,957.26 in reasonable atttorneys' fees and expenses in defending against the initial District Court phase of this case. Petitioners did not challenge the reasonableness or necessity of the attorneys' fees and expenses incurred by Respondents, but they did assert that a sanction in the amount of those fees and expenses might exceed the value of their assets. Respondents replied, *inter alia*, that, while they believed that meaningful monetary sanctions should be applied, they had no desire to injure Petitioners and would defer to the District Court's discretion on the amount to be awarded.

The District Court considered the parties' positions and decided that a non-monetary sanction would not be appropriate here.

> No appropriate "non-monetary" sanction comes readily to mind. None is suggested, and, indeed, the Court is shown no authority for employing such innovations as, for example, community service in lieu of at least partial recompense for an aggrieved opposing litigant.

(A15-16.) The District Court then imposed monetary sanctions on Petitioners totalling approximately 17 percent of the amount that Respondents had established as reasonably incurred in their defense. *Id.*

Whether a particular sanction or type of sanction is "appropriate" is, of course, at the heart of the District Court's discretionary power. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 400. The District Court expressly rejected the idea of community service in lieu of payment of at least partial compensation to the aggrieved parties here. It obviously considered public censure or public admonition of Petitioners to be also inappropriate here.[2]

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[2] These sanctions would, similarly, fail to provide at least patrial recompense to the aggrieved parties. In addition, the District Court may have reasoned, notwithstanding the argument being made by Petitioners, that the public censure or public admonition of a prac-

Moreover, attorneys' fees awards "have become the Rule 11 sanction of choice." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336, at 113 & n.70 (1990):

> Professor Nelken aserts that in 96% of the reported cases in which Rule 11 is violated, attorney's fees are imposed as a sanction. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 1986*, 74 Geo. L. J. 1313.

The District Court's exercise of its discretion in selecting the appropriate sanction here was eminently reasonable under the circumstances and under the applicable law. Consequently, the Court of Appeals' affirmance of that appropriate exercise of discretion was not erroneous.

Petitioners also argue that there was no finding by the District Court sufficient to establish a violation of Rule 11 and that it was therefore incorrect for the Court of Appeals to reverse the District Court's denial of sanctions. Petitioners' premise, that the District Court did not make a finding that Rule 11 had been violated, is completely belied by the District Court's unequivocal statement that the case "offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." (A26, 702 F. Supp. at 322.) The Court of Appeals correctly held in the first appeal that the finding by the District Court was tantamount to a finding that Rule 11 was violated. (A11-12, 886 F.2d at 440.) Thus, the Court of Appeals' ruling was fully consistent with the exercise of appellate authority clearly contemplated under *Cooter & Gell*.

Petitioners further argue that their Complaint against the President of the United States, the British Prime Minister and other defendants was viable under the precedents applicable to war crimes and war criminals. It is

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ticing lawyer is a more—not less—severe sanction than the imposition of a relatively modest monetary sanction.

manifest that such an argument, requiring the federal courts to adjudicate the President of the United States, the leader of one of the United States' closest allies, and other public officials to be war criminals is neither warranted by existing U.S. law nor by a good faith argument for the extension, modification, or reversal of existing law. On their motion to dismiss, Respondents raised numerous meritorious defenses, any one of which would doom Petitioners' case. These included head of state immunity, foreign sovereign immunity, lack of personal jurisdiction, the act of state and political question doctrines, and failure to state a cause of action. The District Court succinctly and correctly described the case as one having no hope whatsoever of success, and the Court of Appeals agreed with that assessment.

Moreover, the fact that Petitioners' Complaint and their other extensive filings caused counsel for Respondents to expend hundreds of hours researching and responding to Petitioners' laundry list of allegations "supported" by inaccurate references to United Nations Resolutions, numerous international conventions and other inapposite authorities, certainly does not constitute evidence that the initiation of the litigation was proper for purposes of avoiding Rule 11 sanctions. Indeed, this circumstance increases the severity of the Rule 11 violation. It was not reasonable for Petitioners to bring this case against the United Kingdom and its Prime Minister, in the face of the cumulative and thoroughly well-settled U.S. law that confers protection and immunity on the basis of the many grounds enumerated above. "An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986). *Cf. Business Guides v. Chromatic Communications Ent.*, 111 S. Ct. 922, 933-34 (1991) (Rule 11 imposes an objective standard of reasonable inquiry).

In sum, the decision by the Court of Appeals affirming the District Court's imposition of sanctions for violation

of Rule 11 was correct and should not be reviewed by this Court.

II. THE COURT OF APPEALS DID NOT ERR IN IMPOSING RULE 38 SANCTIONS

Petitioners contend that the Court of Appeals erred in ordering them to compensate Respondents, pursuant to Fed. R. App. P. 38, for the attorneys' fees and costs Respondents incurred on the first appeal. The Court of Appeals held that Rule 38 sanctions were appropriate in light of this Court's decision in *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989), issued before the first appeal in this case, which "clearly bars plaintiffs' claim against the United Kingdom, and that so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal." (A13, 886 F.2d at 441.) Petitioners unsuccessfully sought further review of the Rule 38 sanctions order by means of a petition for rehearing, suggestion for rehearing *en banc*, their first petition for a writ of certiorari, raising the issue again in their second appeal, a second petition for rehearing, and a second suggestion for rehearing *en banc*.

Petitioners argued that the Foreign Sovereign Immunities Act ("FSIA") does not bar claims under the Alien Tort Statute for damages resulting from acts of a foreign sovereign alleged to constitute war crimes. This position is not tenable because, as the Court of Appeals pointed out in the first appeal, this Court in *Amerada Hess* "ruled unanimously and unequivocally that the [FSIA] provides the 'sole basis for obtaining jurisdiction over a foreign state in our courts.'" (A12, 886 F.2d at 440.)

Even before *Amerada Hess*, this principle of law was firmly established by this Court in *Verlinden*,[3] and by the

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[3] In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), the Court stated:

> The [FSIA] *must* be applied by the district courts in *every* action against a foreign sovereign, since subject-matter juris-

Court of Appeals, in several cases including *Practical Concepts Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*) (Edwards, J. concuring), *cert. denied*, 470 U.S. 1003 (1985). The Court of Appeals expressly relied on its prior holding in *Tel-Oren*, in addition to *Amerada Hess*, to support the imposition of Rule 38 sanctions for a frivolous appeal in this case. (A12-13, 886 F.2d at 440-41.) In *Tel-Oren*, the Court of Appeals held that a suit against the Government of Libya, for damages arising from a terrorist attack in Israel, could not be maintained under the Alien Tort Statute because of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards, J.) ("Jurisdiction over Libya is barred by the [FSIA], which preserves immunity for tort claims unless injury or death occurs in the United States. . . ."); 726 at 805 n.13 (Bork, J.) ("Libya must be dismissed from the case because the [FSIA] plainly deprives us of jurisdiction over Libya (*citing Verlinden*)").[4]

Petitioners argue that the Rule 38 award, if it is allowed to stand, will deter counsel from seeking redress in U.S. courts "for the most grievous and criminal injury by an unbridled military." Petition at 64. That argument has no merit here and, indeed, seeks to obscure the strong public interest in making Rule 38 a significant, meaningful deterrent to the filing of frivolous appeals and in putting an end to litigation once jurisdiction has been fully and fairly adjudicated and found to be lacking.

> diction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. . . .

(emphasis added). *See also* 461 U.S. at 491 n.16, 496.

[4] Chief Judge Robinson of the District Court reached the same conclusion in *In re Korean Air Lines Disaster of Sept. 1, 1983*, Misc. No. 83-0345, Mem. & Order at 11 (D.D.C. Aug. 2, 1985) ("[T]o hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the [FSIA]").

Undersigned counsel believe that the second appeal in this case also was frivolous and that additional Rule 38 sanctions would have been appropriate. However, in view of Petitioners' practice of relitigating every issue at every stage in this case, Respondents instructed undersigned counsel not to seek additional Rule 38 sanctions, so as not to provide Petitioners with still another issue to contest in this ever more pointless litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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